

FIRST REGULAR SESSION
HOUSE COMMITTEE SUBSTITUTE FOR
HOUSE BILL NO. 641
97TH GENERAL ASSEMBLY

1273H.10C

D. ADAM CRUMBLISS, Chief Clerk

AN ACT

To repeal sections 34.057 and 107.170, RSMo, and to enact in lieu thereof two new sections relating to retainage requirements on construction of public works projects.

Be it enacted by the General Assembly of the state of Missouri, as follows:

Section A. Sections 34.057 and 107.170, RSMo, are repealed and two new sections
2 enacted in lieu thereof, to be known as sections 34.057 and 107.170, to read as follows:

34.057. 1. Unless contrary to any federal funding requirements or unless funds from a
2 state grant are not timely received by the contracting public municipality but notwithstanding any
3 other law to the contrary, all public works contracts made and awarded by the appropriate officer,
4 board or agency of the state or of a political subdivision of the state or of any district therein,
5 including any municipality, county and any board referred to as the public owner, for
6 construction, reconstruction or alteration of any public works project, shall provide for prompt
7 payment by the public owner to the contractor and prompt payment by the contractor to the
8 subcontractor and material supplier in accordance with the following:

9 (1) A public owner shall make progress payments to the contractor on at least a monthly
10 basis as the work progresses, or, on a lump sum basis according to the terms of the lump sum
11 contract. Except in the case of lump sum contracts, payments shall be based upon estimates
12 prepared at least monthly of work performed and material delivered, as determined by the project
13 architect or engineer. Retainage withheld on public works projects shall not exceed five percent
14 of the value of the contract or subcontract. [unless the public owner and the architect or engineer
15 determine that a higher rate of retainage is required to ensure performance of the contract.
16 Retainage, however, shall not exceed ten percent of the value of the contract or subcontract.
17 Except as provided in subsection 4 of this section,] **If the public owner is not required to**
18 **obtain a bond under section 107.170 because the cost of the public works contract is not**

EXPLANATION — Matter enclosed in bold-faced brackets [thus] in the above bill is not enacted and is intended to be omitted from the law. Matter in **bold-face** type in the above bill is proposed language.

19 **estimated to exceed fifty thousand dollars, the public owner may withhold retainage on the**
20 **public works project in an amount not to exceed ten percent of the value of the contract or**
21 **subcontract.** The public owner shall pay the contractor the amount due, less a retainage [not to
22 exceed ten percent], within thirty days following the latter of the following:

23 (a) The date of delivery of materials or construction services purchased;

24 (b) The date, as designated by the public owner, upon which the invoice is duly delivered
25 to the person or place designated by the public owner; or

26 (c) In those instances in which the contractor approves the public owner's estimate, the
27 date upon which such notice of approval is duly delivered to the person or place designated by
28 the public owner;

29 (2) Payments shall be considered received within the context of this section when they
30 are duly posted with the United States Postal Service or other agreed upon delivery service or
31 when they are hand-delivered to an authorized person or place as agreed to by the contracting
32 parties;

33 (3) If, in the discretion of the owner and the project architect or engineer and the
34 contractor, it is determined that a subcontractor's performance has been completed and the
35 subcontractor can be released prior to substantial completion of the public works contract
36 without risk to the public owner, the contractor shall request such adjustment in retainage, if any,
37 from the public owner as necessary to enable the contractor to pay the subcontractor in full. The
38 public owner may reduce or eliminate retainage on any contract payment if, in the public owner's
39 opinion, the work is proceeding satisfactorily. If retainage is released and there are any
40 remaining minor items to be completed, an amount equal to [two] **one hundred fifty** percent of
41 the value of each item as determined by the public owner's **and the general contractor's** duly
42 authorized [representative] **representatives** shall be withheld until such item or items are
43 completed;

44 (4) The public owner shall pay [the] **at least ninety-eight percent of the** retainage, less
45 any offsets or deductions authorized in the contract or otherwise authorized by law, to the
46 contractor **or a subcontractor or a supplier** after substantial completion of the contract work
47 and acceptance by the public owner's authorized contract representative, or as may otherwise be
48 provided by the contract specifications for state highway, road or bridge projects administered
49 by the state highways and transportation commission. Such payment shall be made within thirty
50 days after acceptance, and the invoice and all other appropriate documentation and certifications
51 in complete and acceptable form are provided, as may be required by the contract documents.
52 **If the public owner or the owner's representative determines the work is not substantially**
53 **completed and accepted, then the owner or the owner's representative must provide a**
54 **written explanation of why the work is not considered substantially completed and**

55 **accepted within ten calendar days to the contractor, subcontractor, or suppliers**
56 **responsible for such work. If such written explanation is not given, the public body must**
57 **pay at least ninety-eight percent of the retainage within thirty calendar days.** If at that time
58 there are any remaining minor items to be completed, an amount equal to [two] **one** hundred **fifty**
59 percent of the value of each item as determined by the public owner's **and general contractor's**
60 [representative] **representatives** shall be withheld until such items are completed;

61 (5) All estimates or invoices for supplies and services purchased, approved and
62 processed, or final payments, shall be paid promptly and shall be subject to late payment charges
63 provided in this section. Except as provided in subsection 4 of this section, if the contractor has
64 not been paid within thirty days as set forth in subdivision (1) of subsection 1 of this section, the
65 contracting agency shall pay the contractor, in addition to the payment due him, interest at the
66 rate of one and one-half percent per month calculated from the expiration of the thirty-day period
67 until fully paid;

68 (6) When a contractor receives any payment, the contractor shall pay each subcontractor
69 and material supplier in proportion to the work completed by each subcontractor and material
70 supplier his application less any retention not to exceed [ten] **five** percent. If the contractor
71 receives less than the full payment due under the public construction contract, the contractor
72 shall be obligated to disburse on a pro rata basis those funds received, with the contractor,
73 subcontractors and material suppliers each receiving a prorated portion based on the amount of
74 payment. When, however, the public owner does not release the full payment due under the
75 contract because there are specific areas of work or materials he is rejecting or because he has
76 otherwise determined such areas are not suitable for payment then those specific subcontractors
77 or suppliers involved shall not be paid for that portion of the work rejected or deemed not
78 suitable for payment; **provided the public owner or the owner's representative gives a**
79 **written explanation to the contractor, subcontractor, or supplier involved as to why the**
80 **work or supplies were rejected or deemed not suitable for payment,** and all other
81 subcontractors and suppliers shall be paid in full;

82 (7) If the contractor, without reasonable cause, fails to make any payment to his
83 subcontractors and material suppliers within fifteen days after receipt of payment under the
84 public construction contract, the contractor shall pay to his subcontractors and material suppliers,
85 in addition to the payment due them, interest in the amount of one and one-half percent per
86 month, calculated from the expiration of the fifteen-day period until fully paid. This subdivision
87 shall also apply to any payments made by subcontractors and material suppliers to their
88 subcontractors and material suppliers and to all payments made to lower tier subcontractors and
89 material suppliers throughout the contracting chain;

90 (8) The public owner shall make final payment of all moneys owed to the contractor,
91 **including any retainage withheld under subdivision (4) of this section**, less any offsets or
92 deductions authorized in the contract or otherwise authorized by law, within thirty days of the
93 due date. Final payment shall be considered due upon the earliest of the following events:

94 (a) Completion of the project and filing with the owner of all required documentation
95 and certifications, in complete and acceptable form, in accordance with the terms and conditions
96 of the contract;

97 (b) The project is certified by the architect or engineer authorized to make such
98 certification on behalf of the owner as having been completed, including the filing of all
99 documentation and certifications required by the contract, in complete and acceptable form; or

100 (c) The project is certified by the contracting authority as having been completed,
101 including the filing of all documentation and certifications required by the contract, in complete
102 and acceptable form.

103 2. Nothing in this section shall prevent the contractor or subcontractor, at the time of
104 application or certification to the public owner or contractor, from withholding such applications
105 or certifications to the owner or contractor for payment to the subcontractor or material supplier.
106 Amounts intended to be withheld shall not be included in such applications or certifications to
107 the public owner or contractor. Reasons for withholding such applications or certifications shall
108 include, but not be limited to, the following: unsatisfactory job progress; defective construction
109 work or material not remedied; disputed work; failure to comply with other material provisions
110 of the contract; third party claims filed or reasonable evidence that a claim will be filed; failure
111 of the subcontractor to make timely payments for labor, equipment and materials; damage to a
112 contractor or another subcontractor or material supplier; reasonable evidence that the contract
113 can not be completed for the unpaid balance of the subcontract sum or a reasonable amount for
114 retention, not to exceed the initial percentage retained by the owner.

115 3. Should the contractor determine, after application or certification has been made and
116 after payment has been received from the public owner, or after payment has been received by
117 a contractor based upon the public owner's estimate of materials in place and work performed
118 as provided by contract, that all or a portion of the moneys needs to be withheld from a specific
119 subcontractor or material supplier for any of the reasons enumerated in this section, and such
120 moneys are withheld from such subcontractor or material supplier, then such undistributed
121 amounts shall be specifically identified in writing and deducted from the next application or
122 certification made to the public owner or from the next estimate by the public owner of payment
123 due the contractor, until a resolution of the matter has been achieved. Disputes shall be resolved
124 in accordance with the terms of the contract documents. Upon such resolution the amounts
125 withheld by the contractor from the subcontractor or material supplier shall be included in the

next application or certification made to the public owner or the next estimate by the public owner and shall be paid promptly in accordance with the provisions of this section. This subsection shall also apply to applications or certifications made by subcontractors or material suppliers to the contractor and throughout the various tiers of the contracting chain.

4. The contracts which provide for payments to the contractor based upon the public owner's estimate of materials in place and work performed rather than applications or certifications submitted by the contractor, the public owner shall pay the contractor within thirty days following the date upon which the estimate is required by contract to be completed by the public owner, the amount due less a retainage not to exceed five percent. All such estimates by the public owner shall be paid promptly and shall be subject to late payment charges as provided in this subsection. After the thirtieth day following the date upon which the estimate is required by contract to be completed by the public owner, the contracting agency shall pay the contractor, in addition to the payment due him, interest at a rate of one and one-half percent per month calculated from the expiration of the thirty-day period until fully paid.

5. Nothing in this section shall prevent the owner from withholding payment or final payment from the contractor, or a subcontractor or material supplier. Reasons for withholding payment or final payment shall include, but not be limited to, the following: liquidated damages; unsatisfactory job progress; defective construction work or material not remedied; disputed work; failure to comply with any material provision of the contract; third party claims filed or reasonable evidence that a claim will be filed; failure to make timely payments for labor, equipment or materials; damage to a contractor, subcontractor or material supplier; reasonable evidence that a subcontractor or material supplier cannot be fully compensated under its contract with the contractor for the unpaid balance of the contract sum; or citation by the enforcing authority for acts of the contractor or subcontractor which do not comply with any material provision of the contract and which result in a violation of any federal, state or local law, regulation or ordinance applicable to that project causing additional costs or damages to the owner.

6. Nothing in this section shall be construed to require direct payment by a public owner to a subcontractor or supplier, except in the case of the default of the contractor on the contract with the public owner where no performance or payment bond is required or where the surety fails to execute its duties under a bond.

[6.] 7. Notwithstanding any other provisions in this section to the contrary, no late payment interest shall be due and owing for payments which are withheld in good faith for reasonable cause pursuant to subsections 2 and 5 of this section. If it is determined by a court of competent jurisdiction that a payment which was withheld pursuant to subsections 2 and 5 of this section was not withheld in good faith for reasonable cause, the court may impose interest

162 at the rate of one and one-half percent per month calculated from the date of the invoice and may,
163 in its discretion, award reasonable attorney fees to the prevailing party. In any civil action or part
164 of a civil action brought pursuant to this section, if a court determines after a hearing for such
165 purpose that the cause was initiated, or a defense was asserted, or a motion was filed, or any
166 proceeding therein was done frivolously and in bad faith, the court shall require the party who
167 initiated such cause, asserted such defense, filed such motion, or caused such proceeding to be
168 had to pay the other party named in such action the amount of the costs attributable thereto and
169 reasonable expenses incurred by such party, including reasonable attorney fees.

107.170. 1. As used in this section, the following terms mean:

2 (1) "Contractor", a person or business entity who provides construction services under
3 contract to a public entity. Contractor specifically does not include professional engineers,
4 architects or land surveyors licensed pursuant to chapter 327, those who provide environmental
5 assessment services or those who design, create or otherwise provide works of art under a city's
6 formally established program for the acquisition and installation of works of art and other
7 aesthetic adornments to public buildings and property;

8 (2) "Public entity", any official, board, commission or agency of this state or any county,
9 city, town, township, school, road district or other political subdivision of this state;

10 (3) "Public works", the erection, construction, alteration, repair or improvement of any
11 building, road, street, public utility or other public facility owned by the public entity.

12 2. It is hereby made the duty of all public entities in this state, in making contracts for
13 public works, the cost of which is estimated to exceed [twenty-five] **fifty** thousand dollars, to be
14 performed for the public entity, to require every contractor for such work to furnish to the public
15 entity, a bond with good and sufficient sureties, in an amount fixed by the public entity, and such
16 bond, among other conditions, shall be conditioned for the payment of any and all materials,
17 incorporated, consumed or used in connection with the construction of such work, and all
18 insurance premiums, both for compensation, and for all other kinds of insurance, said work, and
19 for all labor performed in such work whether by subcontractor or otherwise.

20 3. All bonds executed and furnished under the provisions of this section shall be deemed
21 to contain the requirements and conditions as herein set out, regardless of whether the same be
22 set forth in said bond, or of any terms or provisions of said bond to the contrary notwithstanding.

23 4. Nothing in this section shall be construed to require a member of the school board of
24 any public school district of this state to independently confirm the existence or solvency of any
25 bonding company if a contractor represents to the member that the bonding company is solvent
26 and that the representations made in the purported bond are true and correct. This subsection
27 shall not relieve from any liability any school board member who has any actual knowledge of

28 the insolvency of any bonding company, or any school board member who does not act in good
29 faith in complying with the provisions of subsection 2 of this section.

30 5. A public entity may defend, save harmless and indemnify any of its officers and
31 employees, whether elective or appointive, against any claim or demand, whether groundless or
32 otherwise arising out of an alleged act or omission occurring in the performance of a duty under
33 this section. The provisions of this subsection do not apply in case of malfeasance in office or
34 willful or wanton neglect of duty.

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